

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**ROBERT SEDILLO GUTIERREZ,**

**Movant/Defendant,**

**CIVIL NO. 08-711 RB/LFG  
Crim. No. 05-CR-217 RB**

**UNITED STATES OF AMERICA,**

**Respondent/Plaintiff.**

**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT, RECOMMENDATION, AND  
PROPOSED FINDINGS AND CONCLUSIONS**

**THIS MATTER** comes before the Court on the *Magistrate Judge's Report, Recommendation, and Proposed Findings and Conclusions* [Doc. 54], filed June 29, 2011. The parties were notified that objections were due within 14 days of service of the Report and Recommendation, and that if no objections were filed, no appellate review would be allowed. [See id. at 1 n.1].

Mr. Gutierrez was provided two extensions of time in which to file objections and, on August 1, 2011, pursuant to Anders v. California, 366 U.S. 378 (1967), he timely filed his objections to the *Magistrate Judge's Report, Recommendation, and Proposed Findings and Conclusions*. [See Docs. 56, 58, 59].

Mr. Gutierrez objects to the finding that Mr. Del Valle, Gutierrez' attorney, urged Gutierrez to accept the Government's plea offer and Gutierrez rejected the advice. Instead, according to Gutierrez, the Magistrate Judge should have found that attorney Del Valle assured Gutierrez that he would be able to win an acquittal.

The Court conducted a *de novo* review of those portions of the *Magistrate Judge's Report,*

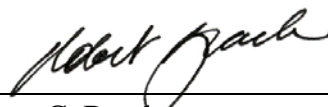
*Recommendation, and Proposed Findings and Conclusions* to which Mr. Gutierrez objects, and deems the objections to be without merit. The Magistrate Judge reviewed the entirety of the trial transcripts and conducted a full evidentiary hearing. He heard the witnesses testify; he saw their demeanor; he considered factors such as their interest, bias, and prejudice, and made credibility decisions.

The Magistrate Judge found Gutierrez' testimony to lack credibility and this conclusion is supported by the record as a whole. It is the province of the fact finder to determine the credibility of a witness. See Saiz v. Ortiz, 392 F.3d 1166, 1185-87 (Hartz, J., concurring) (10th Cir. 2004); see also Fed.R.Civ.P. 52.

**IT IS, THEREFORE, ORDERED** that Robert Sedillo Gutierrez's objections to the *Magistrate Judge's Report, Recommendation, and Proposed Findings and Conclusions* are **OVERRULED**;

**IT IS FURTHER ORDERED** that Mr. Gutierrez's request for a new evidentiary hearing is **DENIED**;

**IT IS FURTHER ORDERED** that the *Magistrate Judge's Report, Recommendation, and Proposed Findings and Conclusions* [Doc. 54] is adopted by the Court, and this cause is dismissed with prejudice.

  
\_\_\_\_\_  
Robert C. Brack  
United States District Judge